Wehr Constructors, Inc. and Kentucky State District Council of Carpenters, AFL–CIO. Cases 9–CA–27465, 9–CA–27540, 9–CA–27549, 9–CA–27762, 9–CA–28008, 9–CA–28137, 9–CA–28140, and 9–CA–28435

December 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

The issues in this case include: whether the administrative law judge correctly found that the Respondent violated Section 8(a)(5) of the Act by unilaterally subcontracting bargaining unit work, by refusing to furnish subcontracting information requested by the Union, and by refusing to bargain with the Union in good faith; whether the judge correctly denied a makewhole remedy for the Respondent's unlawful subcontracting; and, whether the judge correctly found that the Respondent did not violate Section 8(a)(1) of the Act by soliciting employees to resign from the Union in exchange for increased benefits.1 The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,2 and conclusions, except as modified below, and to adopt the recommended Order as modified.3 For the reasons set forth below, we find merit in the General Counsel's exception to the judge's failure to grant a make-whole remedy for the Respondent's unlawful subcontracting. We also find merit in the General Counsel's exception to the recommended dismissal of the Section 8(a)(1) allegation regarding the Respondent's solicitation of resignations from the Union.

1. On January 3, 1991, at a meeting held in anticipation of a strike, the Respondent's project manager, Paul Hinson, read a memorandum to assembled carpenters. The memorandum stated, in part:

If a strike or a picket is in place and you desire to continue to work for Wehr, do not cross the line until you have submitted a letter of resignation to the Union. This will prevent any fines from being levied. We will resolve and work out your benefits immediately so that you will not lose important coverage.

At another meeting held around the same date, one of the Respondent's carpenters asked what benefits he would receive if he resigned from the Union. In response, Project Manager Gary Brooks distributed to unit employees a letter "to confirm our agreement as you leave the Carpenter's Union and switch to our fringe benefits." The letter listed several benefits which unit employees did not currently receive.

The judge discounted the memorandum and the letter as mere factual statements by the Respondent regarding the benefits that unit employees would receive if they resigned from the Union. The judge erred, however, by equating union membership with unit employee status. Whether or not the Respondent's carpenters chose to remain members of the Union during a strike, they would remain employees in the unit represented by the Union. The Respondent would be obligated to maintain current benefits for those employees unless and until it bargained in good faith to agreement or to impasse with the Union about proposed changes in benefits. Accordingly, the Respondent's prestrike letter effectively promised unit employees that the Respondent would unilaterally provide them with new benefits if they resigned from the Union. We conclude that the Respondent violated Section 8(a)(1) of the Act by soliciting employees to abandon the Union in exchange for greater benefits.

We note that the General Counsel has not contended in his exceptions that the memorandum also violated Section 8(a)(1) by suggesting that employees had to resign from the Union in order to return to work during a strike.

¹On March 31, 1993, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief in support of cross-exceptions and in response to the General Counsel's exceptions. The General Counsel filed an answering brief.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ Amounts owed by the Respondent to employees whom it unlawfully paid a lower wage rate shall be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Member Stephens agrees that the Respondent violated Sec. 8(a)(5) and (1) of the Act by virtue of its delayed and incomplete responses to the Union's requests for information in December 1990, and that the Respondent should be required to furnish all of the contractual documents therein requested in view of their obvious relevance to the issue of how much carpentry work was potentially within the Respondent's power either to perform through its own employees or to subcontract to other firms. Because of the Respondent's failure to promptly furnish all of those requested documents and its cryptic and misleading references to its status on the various projects, the Union was justified in seeking additional information about the Respondent's operations. Member Stephens agrees with the Respondent, however, that a number of the items requested in the Union's so-called "A/B/C questionnaire" sent on January 4, 1991, and reaffirmed in subsequent letters, and the Union's request for records going back several years ranged beyond what was needed for mean-

ingful bargaining. Thus, Member Stephens would not require the Respondent to supply those additional documents *if* it supplies, in complete form, all documents encompassed by the Union's December 1990 requests and if those documents fully explain the Respondent's potential control over carpentry work in projects in which it was involved.

2. In adopting the judge's conclusion that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing its subcontracting practices, we do not rely on that part of the judge's analysis which is based on *Nolde Bros. Inc. v. Bakery Workers*, 350 U.S. 243 (1977). We do agree, however, that the judge correctly rejected the Respondent's contention that its subcontracting practices after the Union's certification amounted simply to an unchanged continuation of the Respondent's previous lawful subcontracting practices; and therefore we find no merit to the Respondent's present contention that its unilateral postcertification subcontracting was lawful under *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).

In Westinghouse, the Board held that the employer acted lawfully in failing to bargain over each individual act of subcontracting where those actions were entirely consistent with a practice that had been knowingly acquiesced in by the union over many years of bargaining. (The union had frequently sought a change in the practices; it would finally, however, sign collective-bargaining agreements that put no constraints on the subcontracting but granted other benefits to assure job security.) Id. at 1577. In the present case, as the judge found, the 1986-1989 contract between the parties had prohibited the Respondent from subcontracting contractually covered work to employers that would not sign the agreement, and the term of that contract was the most recent period showing the Respondent's practices within a collective-bargaining relationship. The Respondent's contention that its subcontracting practices had been governed by an oral agreement between it and the Union that was contrary to the plain language of their 1986-1989 written agreement, was properly rejected by the judge, who credited testimony that the Respondent's own representative admitted in 1987, when confronted by the Union over a breach of the subcontracting clause, that there was no such oral agreement.4 Westinghouse is therefore inapposite.

AMENDED CONCLUSION OF LAW

Add the following Conclusion of Law 11.

"11. By promising employees increased benefits in exchange for their resignation from the Union, the Respondent violated Section 8(a)(1) of the Act."

AMENDED REMEDY

Although the judge found that the Respondent violated Section 8(a)(5) of the Act by subcontracting bargaining unit work on various projects subsequent to the Union's certification as the employees' bargaining agent, he declined to recommend a make-whole remedy for this violation "[b]ecause the record does not reveal which unit employees were adversely affected by this practice." The General Counsel has excepted on this point. We find merit in this exception.

The import of the judge's statement is that the General Counsel failed to show that unit employees would have been employed on the projects in question had the Respondent complied with its bargaining obligation. The judge is incorrect for two reasons. First, the determination of which employees are entitled to be made whole in these circumstances is customarily a compliance matter. Dean General, 285 NLRB 573 (1987); Wayne Electric, 226 NLRB 409 fn. 3 (1976). Consequently, the General Counsel had no obligation to litigate a compliance issue about affected employees in the initial unfair labor practice stage of this proceeding. Second, the judge's reasoning presumes that the Respondent, faced with union signatory limitations, would necessarily have subcontracted unit work to union signatory employers. The judge has ignored the possibility that the Respondent would have chosen to perform some or all of the work itself with its own unit employees. As the wrongdoer, the Respondent bears the burden of showing that it would not have performed unit work under these circumstances. See D.S.E. Concrete, 303 NLRB 890, 899 (1991). Accordingly, we shall direct that the Respondent make whole, with interest, any employees who suffered losses of wages and other benefits as a consequence of the Respondent's unlawful subcontracting.5

ORDER

The National Labor Relations Board orders that the Respondent, Wehr Constructors, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Threatening to lay off employees because of their union activities.
- (b) Discharging, refusing to recall, or otherwise discriminating against, employees because of their union activities.
- (c) Failing and refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment, including subcontracting and access to jobsites, with the Union as the exclusive representative of the employees in the following unit,

⁴We note in arguing its "oral agreement" contention, the Respondent relies on a district court decision that was reversed on appeal. *Merk v. Jewel Food Stores*, 702 F.Supp. 1391 (N.D. Ill. 1988), revd. 945 F.2d 889 (7th Cir. 1991), cert. denied 488 U.S. 956 (1992). The Respondent's argument is also contrary to Board precedent, which does not permit evidence of oral agreements that conflict with the written terms of a collective-bargaining agreement. *NDK Corp.*, 278 NLRB 1035 (1986). Accord: *F. G. Lieb Construction Co.*, 311 NLRB 810, 812 (1993), and cases there cited.

⁵The judge also failed to recommend the customary expunction remedy for the Respondent's unlawful discharge of employee David Keith. See *Sterling Sugars*, 261 NLRB 472 (1982). We shall add the appropriate language to the Order and notice.

which is appropriate for the purpose of collective bargaining:

All journeymen and apprentice carpenters employed by the Respondent at jobsites within the State of Kentucky, including foremen, excluding all other building trades craftsmen, office clerical employees and all professional employees, guards, and supervisors as defined in the Act.

- (d) Subcontracting bargaining unit work at its construction projects without bargaining in good faith with the Union.
- (e) Failing and refusing to comply with the Union's demand for relevant information.
- (f) Paying lower or light commercial rates to the employees without bargaining in good faith with the Union.
- (g) Denying or restricting access of union officials to unit employees at the Respondent's jobsites, without bargaining with the Union in good faith.
- (h) Soliciting employees to resign their union membership by promising them increased benefits.
- (i) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of its employees in an appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody it in a collective-bargaining agreement.
- (b) Offer David Keith immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him.
- (c) Remove from its files any reference to the unlawful discharge and refusal to recall David Keith and notify him in writing that this has been done and that the discharge and refusal to recall will not be used against him in any way.
- (d) Rescind its unilateral implementation of policies relating to the Union's access to jobsites, the payment of lower or light commercial wage rates, and the subcontracting of unit work.
- (e) Make whole, with interest, all unit employees for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful unilateral implementation of new pay rates and subcontracting practices.
- (f) Provide the Union information which it has previously requested and which is relevant and necessary to the performance of its duties as a bargaining representative.

- (g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (h) Post at its Louisville, Kentucky facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to lay off employees because of their union activities.

WE WILL NOT discharge and refuse to recall, or otherwise discriminate against, employees because of their union activities.

WE WILL NOT fail and refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment, including subcontracting and access to jobsites, with Kentucky States District Council of Carpenters, AFL-CIO (the Union) as the exclusive representative of our employees in the

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

following unit, which is appropriate for the purpose of collective bargaining:

All journeymen and apprentice carpenters employed by us at jobsites within the State of Kentucky, including foremen, excluding all other building trades craftsmen, office clerical employees and all professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT subcontract bargaining unit work at our construction projects without bargaining in good faith with the Union.

WE WILL NOT fail and refuse to comply with the Union's demand for relevant information.

WE WILL NOT pay lower or light commercial rates to our unit employees without bargaining in good faith with the Union.

WE WILL NOT deny or restrict preexisting access of union officials to unit employees at the Respondent's jobsites, without bargaining in good faith with the Union.

WE WILL NOT solicit employees to resign their union membership by promising them increased benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees in an appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an agreement is reached, WE WILL embody it in a collective-bargaining agreement.

WE WILL offer David Keith immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful discharge and refusal to recall David Keith and WE WILL notify him in writing that this has been done and that the discharge and refusal to recall will not be used against him in any way.

WE WILL rescind our unilateral implementation of policies relating to the Union's access to jobsites, the payment of lower or light commercial wage rates, and the subcontracting of unit work.

WE WILL make whole, with interest, all unit employees for any loss of earnings or other benefits suffered as a result of our unlawful unilateral implementation of new pay rates and subcontracting practices.

WE WILL provide the Union information which it has previously requested and which is relevant and

necessary to the performance of its duties as a bargaining representative.

WEHR CONSTRUCTORS, INC.

Andrew L. Lang and Garey E. Lindsay, Esqs., for the General Counsel.

Andrew J. Russell and James U. Smith III, Esqs. (Smith & Smith), of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried on October 8 and November 4-8, 1991, in Louisville, Kentucky. The charges were filed by Kentucky State District Council of Carpenters (the Union) in the following cases: Case 9-CA-27465 on April 19, 1990, Case 9-CA-27540 on May 22, 1990, Case 9-CA-27549 on May 25, 1990, Case 9-CA-27762 on August 10, 1990, Case 9-CA-28008 on November 8, 1990, Case 9-CA-28137 on December 19, 1990, Case 9-CA-28140 on December 20, 1990, and Case 9-CA-28435 on April 9, 1991. Based on these charges, the General Counsel issued his fifth consolidated amended complaint on June 5, 1991, alleging that the Respondent, Wehr Constructors, Inc., violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by acts such as (a) threats to lay off employees and to subcontract with nonunion contractors; (b) having union representatives removed from the jobsite; (c) encouraging employees to resign from the Union, (d) promising benefits for employees' resignation from the Union; (e) discharging and failing to recall employee David Keith, a union steward; (f) restricting and prohibiting the Union's access to the jobsite; (g) subcontracting bargaining unit work; (h) paying lower than agreed to wage rates on certain projects; (i) refusing to furnish relevant information to the Union; (j) refusing to bargain in good faith with the Union; and (k) violating the terms of a settlement agreement. The Respondent filed timely answers to the complaints in which the jurisdictional allegations of the complaints are admitted and the substantive allegations of the complaints are denied.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Wehr Constructors, Inc., is a corporation, located in Louisville, Kentucky, where it is engaged as a contractor in the building and construction industry. With purchases and receipts of products and goods at its Louisville, Kentucky facilities valued in excess of \$50,000 from points outside the State, the Company is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, Kentucky State District Council of Carpenters, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Wehr Contractors is one of the largest general contractors in the Louisville, Kentucky area (R. Exh. 7). It has a history of bargaining with the District Council of Carpenters, the Operating Engineers Union, and the Laborers Union. In 1980, Wehr withdrew its membership in an employer association (AGCR) which had negotiated with the Carpenters Union, and, thereafter, Wehr continued to bargain individually. The last collective-bargaining agreement between the parties expired May 31, 1989 (G.C. Exh. 2). Prior to its expiration, contract negotiations for a successor agreement were initiated by the Union in December 1988. In response to the Company's letter notifying the Union that it would no longer recognize the Union after the expiration of the contract, the Union on May 30, 1989, filed a petition for certification and was certified by the Board as the exclusive representative for the carpenters (G.C. Exh. 4). The principal negotiators, Lawrence Hujo, the Union's director of organizing, and James Smith, an attorney for the Company, met 4 times before May 31, 1989, and approximately 12 times thereafter without reaching an agreement (Tr. 107-110). The principal issue to be resolved was the subject of subcontracting. The expired contract contained the following provision (G.C. Exh. 2, Tr. 113):

1.10: SUB-CONTRACTING—The signatory contractor, who sub-contracts any portion of the work within the jurisdiction of the Union, agrees he will not sub-contract to any person, firm, or corporation, unless the aforesaid person, firm, or corporation performing the sub-contract work in question, agrees to observe and be bound by all of the terms and conditions of this Agreement.

The Union recognizes that the Employer is free to sub-contract work which is not of the type coming within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, Incorporated, as set forth in Section 1.3 of this Article, to Employers who are not signatory to this Agreement.

During the negotiations, the Respondent wanted to change the clause and have "the right to subcontract interior systems work and case work to non-signatory companies" (Tr. 113).

The "subcontracting" issue was not a novel problem for the parties. The same issue was raised by the Company prior to the expired contract. For example, the Respondent referred to a prior addendum to the contract (addendum I) (R. Exh. 4, Tr. 992–1000). Addendum I was made a part of the collective-bargaining agreement prior to the 1986 contract and was intended to provide the Company with the necessary flexibility to deal with subcontracting problems. However, in subsequent negotiations for the 1986 contract, the Company took the position stated by Wehr's president, Claude Berry (Tr. 1001–1002):

They [union officials] insisted that Addendum One was a workable solution to the problem, and I did not believe that it was.

It had not worked in the past and I did not think that it would work in the future. I did not want to consider Addendum One as a solution to the problem. The Respondent had therefore notified the Union in 1986 that it would not sign a contract containing the restrictive subcontracting clause even with the addendum proviso. The union representatives, Garrison and Phelps, met with Claude Berry. According to Berry, the union officials assured him that they had not caused any trouble about the subcontractor clause in the past and promised: "We will not in the future, if you will call us and inform us when it is necessary for you to use a non-union subcontractor, let us know about it, give us a chance to have someone else respond and see if they can be competitive. If they cannot, you'll have no trouble in the future as you have had no trouble in the past' (Tr. 1004).

In the belief that a "gentlemen's agreement" had been reached allowing subcontracting to nonunion firms so long as the Union was notified permitting it to submit a competing bid, the Respondent signed the collective-bargaining agreement (Tr. 1005–1006). Berry explained this agreement as follows (Tr. 1005–1006):

The only provision was to notify Mr. Garrison—or I don't know if his name was mentioned, I took it that we were supposed to notify Mr. Garrison, if the bids on a project came in and a non-union subcontractor was the low bidder, we were to notify Mr. Garrison of that fact, and give him an opportunity to have someone who was signatory to his contract give us another quote, if he could.

In spite of the subcontracting clause in the contract, the Respondent subcontracted with nonunion companies, primarily for drywall and casework (Tr. 1006). However, in practice, the Company failed to notify the Union, giving it "an opportunity to have someone who was signatory to [the] contract give . . . another quote" (Tr. 1006).

In 1987, Steve Barger was the executive secretary and business manager of the Union. He requested the Respondent to comply with the written terms of the contract and objected to the Company's use of nonunion subcontractors. Berry referred to the "gentlemen's agreement," but Barger stated that he was unaware of such an agreement. Barger insisted and Berry agreed that the contract barred nonunion subcontractors (Tr. 1009).

When in December 1988, Lawrence Hujo became the Union's negotiator, it was clear during the initial bargaining sessions that subcontracting was again the major issue. Berry informed the Union that it was unwilling to sign another contract with the subcontracting clause and the Union responded by saying that it was willing to negotiate to find a solution (Tr. 109–112, 1015–1022).

On March 5, 1990, Wehr submitted a contract proposal according to which the "Company may subcontract any portion of its work coming within the jurisdiction of the Union to any" subcontractor "when such work can be performed on a more economical or efficient basis" (Tr. 125, G.C. Exh. 208, p. 9). This proposal differed from the Company's earlier verbal proposals which sought subcontracting concessions in the area of "interior systems and case work" and which comprised 60 to 80 percent of the carpenter work (Tr. 121–122). The Union proposed that the Company would be permitted to subcontract to nonsignatory employers so long as these subcontractors payed union rates or the equivalent of

union rates and benefits (Tr. 120). Neither of the proposals was acceptable to the parties.

At the next meeting on April 11, 1990, a Federal mediator, Joe Kirkham, attempted to assist the negotiations. However, his suggestion for a joint committee to award bids to subcontractors was rejected by James Smith, Wehr's negotiator (Tr. 129). The Union suggested a "think tank" composed of management and union representatives to resolve the issue. The Company rejected that suggestion at the next meeting. The Union demanded a written definition for "casework" a term used by the Company for work specifically identified for subcontracting. Smith, who initially agreed to provide that information to the Union, however, failed to provide the requested information (Tr. 131).

The parties did not hold any bargaining sessions until December. In the meantime, the Union had received information that Wehr was in the process of subcontracting carpenter work on projects such as Humana Suburban. Trying to find out the extent of subcontracting difficulties with Wehr's customers, the Union sent written requests dated December 12, 1990, to the Respondent for copies of contracts between Wehr and 21 of its contractors (G.C. Exhs. 14(a)-(u)). The letters signed by Hujo, identified the specific job by firm and job number and explained that the "significant issue presented during the negotiations has been subcontracting" and therefore relevant. By letter of December 14, the Union also requested a list of bidders invited by Wehr for a Humana Hospital project (Tr. 134; G.C. Exh. 15). The Company's response, drafted by Attorney Smith in a letter of December 17, 1990, questioned the relevancy of the information and postponed any consideration of the request to a negotiation meeting scheduled for December 28, 1990 (G.C. Exh. 16).

During the meeting on December 28, Smith emphasized that subcontracting was the major issue and questioned whether a way could be found to resolve the issue without having to provide the information requested by the Union. The Union had proposed the "think tank," but Smith again rejected the proposal, and stated that he was not interested in having everybody in the universe involved with the problems between Wehr and the Union. Believing that 90 percent of the work was subcontracted to nonunion companies, the Union again stressed the relevancy of its information request (Tr. 135, 140). But Smith said that the Company had no control over the subcontractors. The parties scheduled another meeting for January 2, 1991, and agreed to submit proposals and counterproposals (Tr. 141).

The January 2 meeting was a surprise to the union representatives. First, Smith was accompanied by his brother, his law partner, second, Smith presented the Union with Wehr's "last, best and final offer" which contained at least two provisos never discussed before, a "light commercial rate" provision and a "most-favored nations" clause (Tr. 144, G.C. Exh. 17). The Union questioned these provisos and offered 5 provisions as counterproposals, all of which were rejected by Wehr's representatives (Tr. 147; G.C. Exh. 18). The Union did not accept the Company's proposal. However it repeated its demand for the information which had been requested earlier. Smith did not produce copies of the contracts or other documents, instead, he gave a verbal response to some of the questions (Tr. 142). In Hujo's words, the meeting ended as follows (Tr. 149):

It ended, Mr. Smith gave us a deadline and he told us that we had to contact him by, I believe it was six p.m. on Sunday, and let us know whether—or let him know. I'm sorry, whether we accepted or rejected his last, best and final. And that if we didn't respond by then, they would take it as though we had rejected it and we would be at impasse.

On January 2, 1991, the same day of the negotiations' meeting, Hujo wrote to the Company and Smith a letter stating that Wehr had made an incomplete verbal response to its information requests and that it was making a second request for the same information (G.C. Exh. 19). In the letter, the Union took issue with the Company's response that no contracts existed with respect to certain projects and stated that without the requested information, it was unable to respond by January 6, 1991, or consider the Company's last, best, and final offer. The Company responded by letter of January 3, 1991, purporting to supply information about a few of the projects identified by the Union. None of the project contracts, however, were provided (G.C. Exh. 20). The Union considered the response to be inadequate (Tr. 158). By letter of January 4, 1991, the Union sent another request for information to Wehr (G.C. Exh. 22). Accusing the Company of playing "lawyer's games," the request was aimed at defining the role of Wehr as "general contractor," as a "construction manager" or as a "subcontractor." These concepts were used by Smith in his prior letter of January 3, and referred to Wehr's capacity in various projects. The Union sent a further letter dated January 4, 1991, to Wehr acknowledging receipt of some documentary information but the Union emphasized that the information was still incomplete and in many areas incorrect (G.C. Exh. 23). Of the 23 projects about which it had requested the subcontracting information, the Company had made approximately 10 responses, and Hujo explained in the letter at least 9 instances in which Wehr gave inadequate responses (Tr. 161). Smith's reply of January 9, 1991, contained more detailed information, as well as copies of construction contracts. It also accused the Union of a "disguised attempt to harass the Company" and claimed that the information provided exceed the Union's information request (G.C. Exh. 24). Hujo, however, testified that the response was still incomplete and that "we were getting bits and pieces of our request a little bit at a time" (Tr. 162).

In letters of January 15 and 17, 1991, to Wehr the Union wrote that the information provided was still insufficient and that omitted were about 15 projects listed in the earlier request and added another project (G.C. Exhs. 25, 26). Smith replied with a two-page letter of January 18, 1991, explaining Respondent's function as contractor and stating that the manufacture and installation of casework is frequently controlled by the subcontractor as shown by an attachment referred to as the Heisler letter (G.C. Exh. 27). The Respondent also emphasized that the Union had until January 20 to accept or reject its 'last, final and best proposal.'

The Union again disagreed with the Respondent that all the information had been supplied, or that the parties were at an impasse in the negotiations. By letter of January 18, 1991, Hujo reiterated the need for all requested information and expressed hope that an agreement could be reached pointing out that the parties had never even discussed two

important provisions, one dealing with most-favored nation conditions and the other a proposal for light commercial rates (G.C. Exh. 28).

Smith's three-page letter of January 22, 1991, declared that the parties had reached an impasse because the Union had not responded to the Company's offer. The letter also offered additional information and declined to participate in any assisted mediation (G.C. Exh. 29). Although the Union had requested a list of invited subcontractors for the "Humana Suburban outpatient lobby and lab extension," Smith's letter did not respond to that request even though such a list existed according to Hujo's testimony (Tr. 168–172).

The Company sent a series of letters, beginning with one dated January 23, 1991, to the Union notifying it of a specific construction project quoting a reduced hourly rate for carpenters, referred to as "light commercial" rates, and giving the Union an opportunity to bid for the work (G.C. Exh. 30). The Union repeated its information requests for contracts on its projects in its continued efforts of obtaining information relating to Wehr's contracting and subcontracting practices by letter of January 25, 1991 (G.C. Exh. 31). Among the items were bid specifications for an attached list of 19 projects as well as documentation showing the total of carpenter hours worked on these projects (G.C. Exh. 31, Tr. 182).

The parties met at Smith's office on January 28, 1991, for a negotiation session. Smith made available to Hujo three boxes full of documents including requested bid specification (Tr. 184–185). The union representatives were unable to review all the materials and was unable to copy relevant portions. (G.C. Exh. 32.)

Hujo examined the documents more completely on a subsequent day in February (Tr. 189). The documents revealed, according to Hujo, that, contrary to Respondent's prior representations, the bid specifications of the property owners did not require that casework be installed by the manufacturer, and second that the bid specification generally did require a written "contract between the owner and the successfully bidder," and third that the bid specifications required daily and weekly progress reports (Tr. 190-204). Wehr disputed Hujo's interpretation of the meaning of the provision in the typical bid specifications regarding the installation of casework. It provides: "Provide hospital case work with tops manufactured or furnished by same hospital case work company for single responsibility" (Tr. 207). The Union also felt that progress reports sometimes known as superintendent's daily reports, would be necessary information relevant to the issue of subcontracting.

By letter of January 29, 1991, the Union replied to Wehr's request to use "light commercial rate" pay on its projects (G.C. Exh. 33). According to the letter, "the work in question would not appear to be qualified for designation as 'light commercial,'" but for a more definitive answer, the Union demanded to know the amount of bargaining unit work which would be subcontracted by its own carpenters (G.C. Exh. 33). The Union also expressed its willingness to go along with the Company's request if it will "certify in writing that [it] will observe the subcontracting conditions of the 1986–1989 contract." Hujo's letter of January 30, 1991, repeated its demand of information, particularly the superintendent's daily reports, as well as the identity of and the

hours worked by subcontractors in Wehr's projects (G.C. Exh. 35). Smith replied by letter of January 30, 1991, in which he briefly explained the types of projects for which Wehr would submit bids and the procedure it follows in soliciting bids (G.C. Exh. 36). The letter also repeatedly referred to the Heisler letter as an explanation of Wehr's handling of the manufacture and installation of casework and further stated that the Humana organization will award subcontracts to the lowest bidder "irrespective of union affiliation."

The Union insisted in its letter of January 31, 1991, that the Company had not provided the information showing: "What work within the jurisdiction of the [Union] does Wehr intend to perform with their own forces and what does Wehr intend to subcontract" (G.C. Exh. 37). The letter emphasized the significance of the information because "subcontracting of bargaining unit work has a tremendous effect on prospective job opportunities for [its] bargaining unit members." The Company's response of January 31, 1991, indicated that Wehr would submit bids for work in certain areas, including demolition, concrete, earthwork, and rough and finish carpentry, and it would also receive bids from subcontractors for the same areas of work. If its bids would not be competitive with those of qualified subcontractors, then it would submit the lowest bids even if it was not its own bid (G.C. Exh. 38). In the same letter, Wehr indicated that without the light commercial rates it would not be competitive and it therefore renewed its request for the Union's consent for the lower rate of pay. Hujo sent a short reply on February 1, 1991, expressing disagreement with the lower pay scale without Wehr's assurance that carpenter work will be performed by unit employees employed by the Respondent or by a signatory subcontractor (G.C. Exh. 39). The Union's letter of February 1, 1991, acknowledged receipt of copies of contracts on certain projects and repeated its requests for the bid specifications on certain other projects (G.C. Exh. 40).

Wehr promptly replied on February 4, 1991, stating that it would not agree that all work on the Humana projects be performed by unit employees because it "would be inconsistent with the Company's general practice regarding subcontracting" (G.C. Exh. 41). Smith, writing on behalf of Wehr, also stated that absent other suggestions from the Union, the parties were at an impasse so that Wehr would use the light commercial rate on the projects and also proposed that the Company's contract proposal be changed to reflect the application of the light commercial rate to all projects of \$1 million or less. The Union expressed its disagreement with Wehr's claim of an impasse in a letter of February 5, 1991, and accused the Respondent of bad-faith bargaining (G.C. Exh. 42).

Vice President Berry wrote the Union on February 4, 1991, stating that the Company would not attempt to submit bids on a particular project because of the Union's refusal to permit the application of the lower pay scale. He also stated: "Therefore, the entire job can go non union and we will alert our personnel as to your posture" (G.C. Exh. 43). Smith's letter of February 5, 1991, retracted the substance of the Berry letter, but stated that the Company would be unsuccessful in winning any bids on certain projects if it were to proceed in line with the Union's proposals (G.C. Exh. 44).

By letter of February 14, 1991, Hujo made another request for information on behalf of the Union, stating that it had previously requested the information on a number of occasions but never received it (G.C. Exh. 45). The letter listed seven projects and requested contracts between Wehr and the owners of the projects. The letter also demanded such information as superintendents' daily reports, subcontracts, and bid lists. The Union sent a request for information on February 21, 1991, to Wehr demanding contract information on 24 projects performed between May 1986 and May 1989. The information requested in that letter for contracts, subcontracts, and superintendents reports had not been made before and was deemed necessary because it could permit a comparison of subcontracting information during the periods before and after the expiration of the collective-bargaining agreement. Hujo testified as follows (Tr. 245-46):

We knew that they were basically subcontracting at will to non union companies now. We figured if we could get the man hours worked under the protection of a subcontracting clause versus the man hours worked without the protection, then we could make an comparison and come up with an idea of what we're talking about.

If we're talking about ten percent of the total man hours on these jobs, maybe subcontracting's not as significant as we thought. But if we're talking about eighty percent being subbed out, maybe it's more significant than we thought.

On March 28, 1991, Hujo on behalf of the Union, sent its "Final Demand for Information" to Wehr stating that it had repeatedly requested information concerning subcontracting and that Wehr had furnished some of the requested material but refused to provide all the requested documentation (G.C. Exh. 47). The letter states, inter alia, as follows:

We have, since that time, made further requests dated February 14 (Certified Mail No. P 791-171-308) and February 21, 1991 (Certified Mail No. P 791-171-313). You have made no response whatsoever to either our request dated February 14, 1991 or our request dated February 21, 1991. You have had more than a month in which to respond; you have communicated no excuses and we demand production of this documentation immediately.

To document further what information you have produced and have not produced, we are enclosing our "Final Union Document Demand."

Due to the importance of the issue of "subcontracting" and your regrettable failure to adequately document previous assertions made by Wehr representatives or you, we have, in fact, been deprived of good faith collective bargaining by these failures. If we are required to file a charge with the National Labor Relations Board, the charge will not only be to compel production, but also for this obvious and continued failure to negotiate in "good faith."

We will agree to the terms which you previously established for the production of the limited "bid specification materials" you previously produced in that we will (l) come to your offices, (2) allow the Wehr representative to remain with the original documents, (3)

designate which documents we want copied and (4) pay the fee of \$0.15 per page for photocopying.

We expect you to make the information available in your office during the week of April 18, 1991 for our inspection and copying. Please advise when this information can be reviewed during that week.

Smith replied by letter of April 11, 1991, in which he promised that "to the extent that the requested information has not already been provided to you and is otherwise available and relevant, the Company is in the process of compiling the requested data" (G.C. Exh. 48). Smith disagreed with the Union about the relevancy of certain information, he accused the Union of "an effort to harass the Company and infringe the negotiation process," and expressed the position "that these negotiations . . . have been at an impasse for sometime."

Hujo, by letter of May 2, 1991, acknowledged the Company's assurance to provide the information and stated that "to date, you have not provided any further information" and that it disagreed with the motion that an impasse had been reached. The Union also repeated the reasons for and the relevancy of some of the requested material (G.C. Exh. 49).

The Respondent finally made most of the requested material available to the Union in late May 1991 in Smith's office (Tr. 284). Until then, the Respondent had made inadequate responses, according to Hujo. The "responses came out over a period of time," some of which Smith had provided orally at the bargaining session. Others "came a little bit at a time over a period from January to May" (Tr. 284). However, with respect to the Union's last request for information on 24 projects during 1986 and 1989, Hujo testified as follows: "We haven't received it to date, no, sir" (Tr. 252).

Analysis

I.

The complaint alleges that the Respondent violated the Act by failing to provide copies of all contracts, superintendent's daily and/or weekly reports, subcontracts, construction manager agreements, and other documents concerning 25 named projects performed between May 1986 and May 30, 1989.

The Union made this request by letter of February 21, 1991 (G.C. Exh. 46). By letter of March 28, 1991, the Union made a final demand for information repeating earlier demands, as well as the February 21, 1991 request (G.C. Exh. 47). The Company's response, dated April 11, 1991, described the information sought for the 1986 to 1989 period as irrelevant (G.C. Exh. 48). It is not disputed that the Company refused to provide the information, stating, in substance, that the request amounted to "a campaign of harassment" requiring a tremendous burden on the Company without disclosing any information relevant to the Union (R. Br. 87–90).

The record shows, as already stated, that from the beginning of the bargaining, the issue of subcontracting prevented the parties from reaching an agreement. The Union wanted to know how extensive the practice was and to what extent Wehr controlled the practice of dealing with nonunion firms. To that end, the Union's request was relevant. But the Respondent did not make an immediate attempt to disclose the information to the Union. Not until May 1991 did the Re-

spondent make available to the Union the bulk of the information it had requested since December 1990. The Respondent could have done so earlier and avoided the extensive exchange of letters.

The Union's initial request of December 12, 1990, for contracts between Wehr and owners on 21 projects was designed to elicit information about Wehr's subcontracting practices. The Company's response did not include the actual contracts. Not until May 1991 did the Company make many of their contracts available to the Union (Tr. 286; G.C. Exhs. 55–58, 64–73). And some of the requested contracts material was not supplied until much later when the General Counsel investigated this case (G.C. Exhs. 139–141, 144–164).

For example, Smith in his several responses (January 3, 9, and 18, 1991) enclosed documents showing that notwith-standing the contract between Wehr and the owners, the owners of the project and not Wehr retained control over the subcontracting of carpenter work including casework (G.C. Exhs. 20, 24, 27). A typical attachment conveying that notion was a letter dated January 8, 1991, from Doug Heisler relating to all Humana projects which stated as follows (G.C. Exh. 27):

Several questions have arisen recently regarding contracting and subcontracting procedures on Humana projects. As in the past, Wehr will solicit multiple subbids for each category of work involved. Wehr shall attempt to pre-qualify major contractors prior to bid date as required in the project specifications.

Also consistent with our past practice, the selection of sub-bidders shall not be based on the fact that the firm is either union or non-union. Humana's interest is only that subcontractors are qualified to accomplish the scope of work involved.

No subcontracts are to be executed until Humana has approved the subcontractors. Humana reserves the exclusive right to reject any subcontract bid or subcontractor in all trade areas on any Humana project for any reason.

Additionally in the area of casework, i.e. nurses' stations, doctors' desks, credenzas, bookshelves, cabinets and other finish wood trim, Wehr shall only obtain bids from manufacturers of such products who are designated by Humana. The installation of such casework shall be the obligation of the manufacturer.

The other attachment, written by Sister Regina on behalf of the Little Sisters of the Poor relating to a project known as St. Joseph's Home for the Aged, similarly, provided:

Wehr has been advised by the Owner and both parties agree by this Supplemental Agreement, that notwith-standing the contract the Owner, not Wehr, will retain control and responsibility for soliciting bids and awarding and authorizing contracts for certain specific site work.

These attachments not only raised the question as to Wehr's status as "general contractor" or as "construction manager" with regard to a specific project, but in general it raised the issue to what the extent was Wehr in control of selecting and negotiating with subcontractors. Much of the information which the Respondent provided showed or was designed to

show to the Union that Wehr had little or no control over subcontractors. Moreover, the Union still lacked the actual copies of contracts or subcontracts. Accordingly by letters of January 17 and 18, 1991, the Union repeated its request for more information stating flatly "the Company hadn't given us what we asked for": These requests also showed that the Union wanted to explore in what capacity Wehr performed the work, whether as a general contractor or as a construction manager. Moreover, Wehr had informed the Union that Humana, one of the owners, had prequalified subcontractors for drywall, casework, and flooring work on all Humana Suburban projects. Yet Wehr selected and negotiated contracts with these subcontractors. The Union was therefore interested whether a subcontractor used union or nonunion labor. The Union seemed increasingly frustrated with the complexity of Wehr's contracting practices, the criterion which Wehr used in dealing with subcontractors and the failure of the Respondent to provide copies of the requested documentation. It is true, as the Respondent argues, that the Union's requests changed by expanding its request for contracts on certain projects to subcontractors on those projects and bid lists or lists of invited contractors. However, Wehr's responses to the Union's information requests often raised more questions because of the complexity of the interrelationships between Wehr, on the one hand, and its customers or owners on the other, as well as the subcontractors' relationship to Wehr or the owners.

By letter of January 25, 1991, the Union requested subcontracts, bid specifications, performance bonds, and bond applications on approximately 19 previously identified projects. As already stated, the Respondent disclosed some of the information in May 1991 in Smith's office. For example, several documents relating to Wehr's Humana University projects were disclosed (G.C. Exhs. 59–73). However, some of the requested information was not provided until the General Counsel obtained these documents during the course of the investigation (G.C. Exhs. 144–151, 155–158).

Finally, the Union's request on February 21, 1991, for subcontracting information during the effective period of the collective-bargaining agreement was a new and far-reaching request. However, in view of the Company's complex and varied practices of using subcontractors, it is not unreasonable or irrelevant. Wehr's objections are based on its position that the request is burdensome and not relevant to the Union or certainly not sufficiently relevant "that it reasonably might cause the Union to change its bargaining position on the subcontracting issue" (R. Br. p. 90).

The Union might disagree, however, if it finds that Wehr has avoided the contractual restrictions on subcontracting even during the effectiveness of the contract. In any case, the standard to support a request for information relevant to the Union's duties is a liberal discovery type standard. Walter N. Yoder & Sons v. NLRB, 745 F.2d 531, 535 (4th Cir. 1985). Wehr, as any employer, has an obligation to comply with a Union's request for information that will assist the Union in fulfilling its responsibility as the employees' statutory representative. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). And a failure to provide relevant information on request is a breach of the employer's duty to bargain in good faith and violates Section 8(a)(1) and (5) of the Act. The information sought here is certainly relevant because it has some bearing on the issue for which the information is re-

quested and has probable or potential relevance to the Union's duties. Pfizer, Inc., 268 NLRB 916, 918 (1984). Here, the Respondent appeared more interested in providing limited information designed to fashion conclusions for the Union than in furnishing the requested data in the form of copies of contracts and subcontracts and superintendent daily reports, etc., from which the Union can draw its own conclusions. If the Union concludes, based on the information it has already received, that Wehr has subcontracted at will since the expiration of the contract, particularly in the light of its position that it was no longer bound by the terms of the expired contract following Wehr's notification to the Union, it is clear that the Union should be in a position to compare Wehr's subcontracting practices during the effectiveness of the collective-bargaining agreement. I accordingly find that the Respondent's refusal to furnish the requested information to the Union violated Section 8(a)(1) and (5) of the Act.

II.

The complaint alleges as violations of Section 8(a)(1) and (5) of the Act that (a) since August 4, 1989, the Respondent has subcontracted bargaining unit work at various projects such as Humana Suburban MRI, Medical Center at Bowling Green, Farmer's Deposit Bank, renovations at Respondent's offices Henry County High School and two other Humana projects, and (b) since June 19, 1990, Wehr has paid employees reduced "light commercial" wage rates at Farmers Deposit Bank, Humana Suburban Speaker Corporation jobsites, without having afforded the Union an opportunity to negotiate and bargain as the bargaining representative of Respondent's employees.¹

The record shows and the Respondent does not contest the allegation that Wehr subcontracted bargaining unit work at various projects including those listed in the complaint since the expiration of the collective-bargaining agreement on August 4, 1989, without affording the Union to bargain the issue. For example, the record contains the contracts and subcontracts entered into by Wehr after August 4, 1989, on projects such as the Medical Center at Bowling Green (G.C. Exhs. 55-57, 144-151), the Henry County High School (G.C. Exh. 102), the Farmers Deposit Bank (G.C. Exh. 108-110), and Humana Suburban MRI (G.C. Exhs. 63-65). Indeed, the Respondent listed numerous projects, admitting that it contracted with nonunion subcontractors to perform work falling within the jurisdiction of the Union (R. Exh. 1). The Respondent offers a number of arguments that its practice in this regard did not violate the Act.

The record also shows by way of stipulation that "since June 1990, the Respondent has paid its carpenter employees reduced light commercial wage rates" at various projects, including the Farmer's Deposit Bank, the Humana Suburban MRI, Wehr's office renovation, and Emminence Speaker Corporation Warehouse (Tr. 561).

To be sure, when the collective-bargaining agreement expired, the Union no longer enjoyed the presumption of majority status and either party could repudiate the 8(f) bargaining relationship. *John Deklewa & Sons*, 282 NLRB 1375 (1987). However, here the Union filed its petition pursuant to Section 9 of the Act on May 30, 1989 (G.C. Exh. 3). And on August 4, 1989, the Union was certified as the exclusive

bargaining representative for Respondent's carpenters. During that time, that is prior to the expiration of the contract, during the pendency of the Section 9 process and after certification, the parties met and engaged in collective bargaining during which the issue of subcontracting was admittedly the major issue. Throughout these negotiations, the Union never abandoned its position that subcontracting was a mandatory subject of bargaining. Indeed, it is well settled that an employer's subcontracting practices under these circumstances is a mandatory subject of bargaining. Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964). Wehr's conduct in subcontracting bargaining unit work on projects within the jurisdiction of the Union without affording the Union the opportunity to bargain is therefore a violation of Section 8(a)(1) and (5) of the Act. Century Air Freight, 284 NLRB 730 (1987). There, as here, the employer's decision to subcontract the work did not alter its basic operation, the work still had to be done and the employer replaced its own employees with those of an independent contractor to do the same work. Wehr clearly made the decision on economic grounds. Moreover, Wehr cannot claim that bargaining would be futile, for the record shows that the Union proposed several options to resolve the subcontracting issue.

I find the Respondent's arguments to the contrary not persuasive. Stating that Wehr was justified in relying on past practice and subcontract at will, citing the few months from June to August 1989 while the Union was in the process of certification ignores years of past practice during the effectiveness of the bargaining agreement. In any case, even during the few months when Wehr's practice was not to subcontract all of its carpentry work, it subcontracted bargaining unit work on a selective basis. Under these circumstances, subcontracting bargaining unit work did not loose its status as a mandatory subject of bargaining, particularly here where the issue of subcontracting was the principal issue during the negotiations.

Finally with respect to the Company's practice during the effectiveness of the contract, Wehr argues repeatedly that it had arrived at an oral agreement which modified the contractual provision. For example, the Respondent states that "the oral agreement made in Berry's office required no such advance permission" from the Union for use of nonunion subcontractors (R. Br. 15). The Respondent's reference is to Berry's testimony about a conversation with the union representatives at the time Wehr signed the bargaining agreement in 1986. According to Berry the union representatives assured him that the Union wanted no trouble "if you [Wehr] will call us and inform us when it is necessary for you to use a nonunion subcontractor, let us know about it, give us a chance to have someone else respond and see if they can be competitive." (Tr. 1004.) This conversation even if it could be construed as a verbal agreement—is not tantamount to the proposition that the Union proposed "that a clause go in the contract for appearance purposes but agree that the clause will not be enforced" (R. Br. 101). In actuality, the union representatives thereby only indicated that Wehr—if confronted with a subcontracting issue—should notify the Union to afford it the opportunity to be competitive. In any case, under the circumstances here, it is clear that Wehr knowingly signed a collective-bargaining agreement which in clear and unambiguous language provided in substance that Wehr could subcontract bargaining unit work to

¹ The complaint was amended to reflect that date (Tr. 7).

only those firms which agreed to be bound by the terms of the agreement. Indeed, in early 1987, Union Representative Barger protested Wehr's subcontracting practice and reminded Berry to abide by the terms of the agreement. At that time, Berry did not disagree with the Union's interpretation of the collective-bargaining agreement (Tr. 1008–1009).

The Respondent has advanced a number of additional agreements to the effect that its subcontracting practice did not contravene past practice. For example, the Union is accused of an unlawful refusal to bargain when it reminded Wehr to abide by the terms of the written agreement without consideration of the so called gentlemen's agreement, and it is also argued that the subcontracting clause is unlawful under Section 8(e) of the Act (R. Br. 93, 104). I find these arguments to be without merit. Moreover, I find that irrespective of past practices, Wehr's conduct of subcontracting bargaining unit work on certain projects without affording the Union an opportunity to bargain, to be unlawful under Section 8(a)(5) and (1) of the Act, particularly where, as here, that issue was the principal point of contention between the parties during the negotiations.

Finally, I find that the Respondent's unilateral application of the light commercial rates for its carpenters on certain projects to be unlawful. After the negotiations for a new collective-bargaining agreement were inconclusive, the Company requested the Union's consent to use e lower rates and the Union refused. The parties had not reached an impasse in their negotiations, Wehr's claim to the contrary notwithstanding. Indeed, the issue was never discussed during the negotiations. Unilateral changes by an employer during the course of a collective-bargaining relationship concerning wages and other mandatory subjects of bargaining are considered per se refusals to bargain and violations of Section 8(a)(1) and (5) of the Act. NLRB v. Katz, 369 U.S. 736 (1962).

III.

The complaint alleges that on or about April 12, 1990, the Company's president, Claude Berry, threatened to lay off employees and replace them with nonunion employees and threatened to subcontract Respondent's work to nonunion contractors if further unfair labor practice charges were filed against the Company.

The record shows that in April 1990 Ronald Herp, the Union's business agent, called Claude Berry by telephone to complain about the Company's reduced wages for its carpenter employees on a project known as the Ballard House. According to Herp, Berry "said that he would lay off everybody" because of the "harassing tactics by the Union . . . through the labor board . . . [and] frivolous labor changes and complaints" (Tr. 748). Berry also stated that "he would not ever sign an agreement that had sub-contracting in it" (Tr. 751). These statements by the Company's president were not denied by the Respondent, but it submits that these comments do not rise to the level of a violation of the Act (R. Br. p. 128). Contrary to the Respondent's position, I find a violation of Section 8(a)(1) of the Act, because threats to discharge employees because of the Union and the Board's processes is a classic interference with the employees' Section 7 rights.

IV.

According to the complaint, since February 8, 1990, the Respondent has restricted access of union representatives to the employees at their jobsites, on about May 19, 1990, the Respondent prohibited the Union's access to the employees jobsites, on May 22 the Respondent summoned the police to remove union representatives from its jobsite, and on or about July 27, 1990, the Respondent imposed restrictions on the Union's access to the employees' jobsites.

The record shows that union representatives had unrestricted access to Wehr's jobsites to confer with union stewards pursuant to article 1.6 of the collective-bargaining agreement (G.C. Exh. 2). This practice continued after the expiration of the contract and after the Union's certification on August 4, 1989. According to Hujo, the Union had not encountered any problems with access to the jobsite, stating, "as a matter of courtesy whenever we go on any jobsite . . . we'll stop in at the construction office or the construction trailer and just let the superintendent or someone know we're there" (Tr. 420).

However, by letter of February 8, 1990, Wehr informed the Union "that unless the Union's reason for being on the project is for purposes related to administration with whom the Union has a contractual relationship, access will be denied" and if "there is a legitimate reason for the Union's presence on a Wehr project, please report to Wehr's project trailer and advise our Project Superintendent of the general nature of your business and the approximate length of your stay" (G.C. Exh. 5). The Union objected to these conditions as a unilateral change in established working conditions and filed a grievance by letter of February 13, 1990 (G.C. Exh. 6). The Company responded by letter of February 15, 1990, and referring to the expiration of the collective-bargaining agreement stated, inter alia:

The Company's denial of access to Company projects by Herp, other than as articulated in the letter is not a change in working conditions. Rather it is the denial of a privilege which the union at one time enjoyed but which it longer enjoys.

Although the Respondent acknowledged in the letter that the right of visitation is a mandatory subject of bargaining, it maintained that it can only be granted pursuant to a new agreement (G.C. Exh. 7).

On May 16, 1990, Hujo and Herp went to the Little Sisters of the Poor jobsite in response to a call from the steward, David Keith, that there were problems with the toilets and the drinking water. Hujo and Herp signed the sign-in sheet at the trailer (G.C. Exh. 10). They looked for the project manager, Lonnie Malone, and happened to see Keith. Malone approached the men and told them that the business agent had no right to talk to the men without first obtaining his permission (Tr. 426-427). Hujo informed Malone that the steward had reported problems at the jobsite, namely unsanitary toilets and insufficient drinking water. Malone escorted the union men to the trailer where they discussed the matter with Virgil Parrish, one of the project managers. On the following day May 17, 1990, Hujo and Herp again visited the jobsite in response to Keith's report that Malone was harassing him about his work. The union representatives signed in at the trailer, discussed the new problem with the project superintendent, Dick Pennick, and Malone. During the break, they also spoke with Keith who informed them that he was assigned to perform an exceptionally dangerous scaffolding job. Hujo and Herp returned to the trailer where, during the ensuing discussion, Pennick suggested that the Union appoint a new steward and insinuated that Keith would be fired (Tr. 433–439).

By letter of May 17, 1990, Wehr's representative, Smith, accused the union representatives of interfering with the employees working on the Little Sisters of the Poor project and of delaying the construction of the project. The letter stated, inter alia, that until an agreement is reached, "neither you nor Herp nor any other representative of the carpenters Union will be permitted access to any of the Company's projects." The letter threatened legal steps lest the Union adhere to the prohibition (G.C. Exh. 9). Although the Company initially professed to be motivated out of a concern for the safety of visitors, the letter offered a different reason, namely construction delay.

On May 22, 1990, Hujo, accompanied by another union representative again went to the jobsite to distribute to the employees a leaflet calling attention to their *Weingarten* rights (G.C. Exh. 11). They also wanted to speak with David Huddleston, who was appointed steward following the Company's discharge of Keith (Tr. 439–443). Although the union representatives had followed the usual procedure and signed in at the trailer, Malone ordered them to leave. The Union refused to leave until Malone called the police, who escorted the men off the jobsite.

Wehr's attorney, Smith, again informed the Union by letter of May 27, 1990, of the Company's new policy regarding the Union's access to the jobsites (G.C. Exh. 13).

The record shows in summary that the Company's conduct occurred after the Union had been certified as the employees' bargaining representative and that the Company had abided by the expired contract's access provision until the series of episodes outlined above. A union's access to the jobsite in order to represent its members is a term and condition of employment and subject to bargaining. Respondent's failure to bargain about this issue, as well as its shifting reasons for its new restrictions without a showing of a coherent or rational basis for the unilateral shift in policy, violated Section 8(a)(1) and (5) of the Act. Fashion Furniture Mfg., 279 NLRB 705 (1986).

v

The complaint alleges as violations of Section 8(a)(1) of the Act the conduct of Project Manager Paul Hinson by encouraging employees to resign from the Union and by conditioning thereby their continued employment in the event of a strike and the conduct of Project Manager Garry Brooks by promising benefits if the employees resigned their union membership.

In this regard, Hinson testified that on January 3, 1991, he held a meeting at the Suburban Hospital renovation project site with several employees, two superintendents, and three carpenters. During that meeting, he generally indicated the Company's concern about the possibility of a strike by the Union and the Company's plans in response to a strike. He also passed out a memorandum which had been prepared by management and read portions of it to the assembled em-

ployees (Tr. 1144–1146; G.C. Exh. 213). He, inter alia, read the following paragraph (Tr. 1146):

If a strike or a picket is in place and you desire to continue to work for Wehr, do not cross the line until you have submitted a letter of resignation to the Union. This will prevent any fines from being levied. We will resolve and work out your benefits immediately so that you will not lose important coverages.

When one of the employees asked Hinson whether this meant that he had to leave the Union in order to remain employed, Hinson replied, no, "that it was clearly an individual's choice" (Tr. 1147–1148).

The other incident occurred at the Waterside project where the project manager made preparations for the possibility of a strike pursuant to prior instructions from upper management (Tr. 1166–1167). One of the carpenter foremen, Gary Martin, wanted to know what benefits could the carpenters expect if they left the Union. In response, Project Manager Brooks obtained a document from the Company's offices which listed the company benefits for nonunion employees of the Company (G.C. Exh. 207, Tr. 1169). Brooks distributed copies of the document to the other carpenter employees at the project.

I find that the statements made, as well as the written material distributed fall into the category of factual information provided to union employees which does not rise to the level of coercion or interference with their Section 7 rights and therefore not violative of Section 8(a)(1) of the Act. I accordingly dismiss these allegations of the complaint.

VI

The discharge of David Keith, the union steward on May 17, 1990, and the Respondent's failure to recall him since December 11, 1990, are alleged as violations of Section 8(a)(1) and (3) of the Act.

David Keith, employed by Wehr since April 1987 was appointed union steward on April 12, 1990, by Herp, the union business representative. He worked at the Little Sisters of the Poor jobsite (Tr. 593–596). Lonnie Malone, the project manager, who had initially hired Keith, reacted adversely to the union appointment. For example, on the following day, Malone approached Keith, sprayed red paint on Keith's union button saying: "I want to tell you right now. Steward ain't shit out here. I'll get rid of you quick if you uphold the union in any way" (Tr. 597–598). Malone then described how he had been responsible for the discharge of another carpenter, presumably also a steward. When Keith asked him when is quitting time, Malone replied, "[W]ell, everybody's goin' quit at three-thirty 'cept you, and you stay till four o'clock' cause you're the steward" (Tr. 598–599).

On May 7, 1990, Keith, acting as a steward, complained to Malone about the lack of ice water and the unsanitary conditions in the portable toilets. Malone's reply to these complaints were that the employees should go into the woods or drink the water from a water hydrant if they were dissatisfied with existing conditions (Tr. 596–601). Keith reported the incident to the union officials, Herp and Hujo, who then visited the jobsite and spoke with the project superintendent. Several days later Keith reported to Dewey Riggs, one of the project managers at the Little Sister of Mercy job-

site, that a laborer was performing carpentry work. On that occasion, Malone told Keith that "he didn't appreciate [Keith] calling the business agent out here on him" (Tr. 603). Riggs commented, "David, you're a good worker. I like you, but you gotta' let this union stuff ride . . . when you complain out here about union stuff, it gets back to over office and they'll get rid of you' (Tr. 606).

On May 17, 1991, Keith was fired under the following circumstances, Malone assigned Keith and David Huddleston to demolish a stairwell. After they had begun to work, Malone assigned Huddleston to another job and also said to him that Keith was causing trouble about the water, the toilets, and other matters and that the Berrys had instructed him to fire Keith (Tr. 711–714). While Keith remained on the wrecking job of the stairwell, an assignment usually handled by several men, he had to cut several long pieces of lumber in order to do the job more efficiently. On the same day, Herp and Hujo visited the jobsite to resolve the problems reported earlier by Keith. Their efforts failed, because Malone and Pennick, the project managers, considered the complaints petty and insinuated that the Union select another steward because Keith was about to be fired (Tr. 436–438).

According to Berry's testimony, he ordered the discharge of Keith on learning that he had cut several long two-by-four pieces of lumber in half which in Berry's opinion amounted to a waste of useable lumber. Berry also considered Keith's petty and unjustified complaints about the toilets and the water as reasons to justify the discharge (Tr. 986). At the end of the day, Malone handed Keith an envelope with a letter addressed to the Union and his paycheck with the remarks that he wished him well in his future and that Hujo would be arrested if he visited the jobsite again (Tr. 625).

The Respondent had second thoughts about the discharge of Keith. Berry testified as follows (Tr. 987):

I found that, in talking to some of the men involved on the job that quite possibly we had made an error.

That maybe Mr. Keith had been discriminated against by some of our supervisory personnel. And I got reports from other people that Mr. Keith was a very good carpenter.

I then recalled an incident where Mr. Keith was doing work on another job, on a very dangerous position and had been extremely cheerful about it in my presence.

I didn't realize, at first, that I was dealing with the same man, but my later information led me to believe that we had errored [sic] in discharging Mr. Keith.

Berry conceded in his testimony that the Company had discriminated against Keith and "ordered that Mr. Keith be rehired" (Tr. 988). After being out of work for about 1 month, Keith was offered reinstatement to his job by Jerry Sheely. He worked for 5 weeks and, in connection with the layoff of all carpenters, lost his job again (Tr. 630).

In an effort to be employed, Keith went to Respondent's jobsite at the Actor's Guild project on December 11, 1990. He introduced himself to Danny Overstreet, the project superintendent with whom Keith had worked in the past. According to Keith, the following conversation ensued (Tr. 631):

I said, "hi, I'm David Keith." He goes, "yeah, I know who you are."

I said, "Danny, I'm looking for a job." He said, "I can't help you. I don't need anybody." I said, "well, I figured this was ready to get started now." Danny says, "yeah, I am, but I can't use you."

I said, "well, I'm in the phone book if you need me. Give me a call." He said, "I won't. I've got a lot of men laid off now." I said, "okay see you later."

Overstreet conceded that he worked with Keith on another project and that he came to see him for employment in December at a time when he had not yet finished the ground work (Tr. 1223–1224). Overstreet, testified that he did not offer him a job but that he advised him "to check back with" him in case a subcontractor could use him (Tr. 1225).2 Overstreet denied in his testimony any knowledge of Keith's union activity, his difficulties with management, or Keith's discharge from the Little Sisters of Poor project. He also denied that he received any instructions from management, about Keith and his prior role as a union steward (Tr. 1227).

The record shows that already in December and January and, contrary to his statement to the effect that he did not need anybody, Overstreet hired carpenters Danny Wall, Ed Morris, and Henry Tennell. Indeed, Overstreet hired 10 additional carpenters without contacting Keith. Overstreet conceded that he had placed Keith's name on a list of available employees. Overstreet also stated that Wehr's usual practice is to hire carpenters on layoff in priority over new applicants (Tr. 1241). However, he explained the normal practice of assembling a work force as follows (Tr. 1208–1209):

I start off with the personnel that's worked with me in the past or is presently working with me when I start a job, and that's where I start my work force.

If for some reason I do not have sufficient help, I always check with the other projects to see if they have someone that's in the process of being laid off because of being caught up, to see if I can place some of those people.

If I don't have any other means with the other projects of collecting personnel, I will take to the foremen to see if they have somebody specific they recommend, and if they don't, then I will call the Union hall and get personnel for what I need.

Although Overstreet testified that he hired several carpenters because they were highly skilled, had worked with him in the past, or others who were highly recommended to him, he hired Mike West who had never worked for Wehr in the past (Tr. 1268). The first carpenter hired by Overstreet was Danny Walls whose last employment was with another contractor (Tr. 1211). Overstreet hired Henry Tennell even though he did not know whether he was laid off by Wehr or another company (Tr. 1215). Overstreet hired Guy Pike and Russell Jones by contacting another project manager telling him that he "was needing some men" (Tr. 1217). Yet he had told Keith in December that he did not need anybody. Overstreet hired Paul Seng, Richard Pickard, Wilbur Crick,

²I found Keith's version of the events more credible and plausible than that of Overstreet.

and Dennis Hightower with whom he had not worked before but who had come from another Wehr crew (Tr. 1219).

Overstreet's testimony gives the impression that he would have hired Keith, or that he would have been able to place him into a job with a subcontractor, had Keith been more insistent and checked with him periodically (Tr. 1225-1226). However, I do not credit Overstreet's testimony in this regard. Instead I believe that Keith's recollection of the events are more believable and plausible. Keith, an experienced and highly respected carpenter was familiar with the practices of the construction industry. Had he been given the understanding that there was a possibility of employment, he would have taken the necessary steps. Moreover, Overstreet, who admitted contacting other project superintendents for referrals of carpenters could simply have contacted Keith, because he had placed his name on a list. Finally, Overstreet, when asked a series of questions on cross-examination, was frequently unable to remember certain events surrounding the issue (Tr. 1235-1237).

Considering the Respondent's frequent threats by several supervisors that Keith's conduct as a union steward would cause his discharge or would prevent him from ever working for Wehr again reveals the Respondent's union animus. Keith who admittedly was one of Wehr's best carpenters became known as a union activist because, Wehr's president testified, "[E]verything that happens on one of our construction job[s] makes it[s] way through the whole gambit of them . . . they all knew it and knew it immediately" (Tr. 1092). The evidence clearly shows union animus by Wehr's top management, knowledge of Keith's union activity and discrimination-virtually conceded by Wehr-and his subsequent failure to be recalled. In this regard, the record does not show a dual motive for Respondent's conduct nor has a dual motive been established as a defense by the Respondent. See Wright Line, 251 NLRB 1083 (1980). I accordingly find that the Respondent violated Section 8(a)(1) and (3) of the Act as a result of its discharge and subsequent failure to rehire David Keith.3

VII

Finally, as alleged in the complaint, by its overall acts and conduct, including the threat to discharge employees, the discharge of the union steward, the unilateral decisions to subcontract unit work and to pay lower wage rates, and Wehr's refusal to grant the Union access to jobsites, as well as the failure to furnish the Union the requested information on subcontracting, the Respondent has failed and refused to bargain in good faith with the Union.

I make this finding even though I was impressed by the testimony of Wehr's chairman and chief executive, Claude Berry Jr. He articulated the difficulties of Wehr's position in a highly competitive market and of Wehr as a unionized con-

struction firm in direct competition with nonunionized firms, but he also seemed to express a desire to come to terms with the Union on a collective-bargaining agreement, including a provision dealing with the subcontracting issue. He also indicated the Company's error in discharging Keith, the steward. However, the dealings between Wehr and the Union by their respective representatives has put the Union in a position where it lacks the information necessary to effectively represent its members, where the union steward's complaints about working conditions are ridiculed, where his discharge has the chilling effect in a company where such news travels quickly, and where union representatives who are attempting to deal with management about the working conditions are denied access, evicted by the police, and threatened with future evictions. Furthermore, the Respondent's responses to the Union's request were designed to disclose information which was favorable to its position, as for example the information that the owner of a project controlled the subcontracting rather than Wehr. Other responses to the Union's demands for information confused rather than simplified the issues or the Union's understanding of Wehr's practices, as for example the written replies and certain selected documents showing Wehr's role as a general contractor on a project or as a construction manager. Moreover I did not find credible certain testimony to the effect that Wehr's practice begin a portion of projects as a contractor without a signed contract. The Company could have been more careful in avoiding misunderstandings, as for example, the confusion about the Heisler letter and the existence of certain contracts showing subcontracting of bargaining unit work. Finally, Respondent's repeated claims during the negotiations that an impasse existed or its preparation for a strike, as well as its repeated rejections of any union proposal to resolve the subcontracting issue, as for example, the "think-tank" idea was not contructive during the negotiations.

Considering "the employer's conduct in the totality of the circumstances in which the bargaining took place" not only at the bargaining table but also at "conduct away from the table that may affect the negotiations," I find that the Respondent by its overall acts and conduct has failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Billion Oldsmobile-Toyota*, 700 F.2d 454 (8th Cir. 1983).

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Union is the collective-bargaining representative of Respondent's employees in the following unit:

All journeymen and apprentice carpenters employed by the [Respondent] at jobsites within the State of Kentucky, including foremen, excluding all other building trades craftsmen, office clerical employees and all professional employees, guards and supervisors as defined in the Act.

4. By failing and refusing to furnish the Union with information requested on February 21, 1991, i.e., certain documents concerning 25 projects performed between May 1986

³As further alleged in the complaint, the Respondent violated a settlement agreement signed by the parties on June 5 and 8, 1990, respectively (G.C. Exh. 211). By the terms of the settlement agreement the Respondent promised not to engage in threats "to lay off employees and replace them with non-union carpenters" or "to subcontract [Wehr's] work to non-union contractors" and "in any like or related manner, interfere with, restrain or coerce [the] employees in their" Sec. 7 rights. Considering this conduct as well as other violations of the Act, already discussed, the Regional Director properly set aside the settlement agreement.

and May 30, 1989, which is necessary for, and relevant to, the Union's performance of its function as the bargaining representative of its employees, the Respondent violated Section 8(a)(1) and (5) of the Act.

- 5. By subcontracting bargaining unit work on various projects subsequent to the Union's certification as the employees' collective-bargaining agent, the Respondent violated Section 8(a)(1) and (5) of the Act.
- 6. By threatening to lay off employees because of the Union's conduct, the Respondent violated Section 8(a)(1) of the Act.
- 7. By imposing restrictions on the Union's access to unit employees at Respondent's jobsites, denying union representatives access to jobsites, and forcibly removing them from jobsites, the Respondent violated Section 8(a)(1) and (5) of the Act.
- 8. By paying labor or "light commercial" wage rates on certain projects without bargaining with the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.
- 9. By discharging its employee David Keith, a union steward, and failing to recall him from layoff, because of his union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.
- 10. By its overall conduct, including its violations of the Act, the Respondent has failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3), (5), and (1) of the Act, I shall recommend that

it cease and desist therefrom and, on request, bargain collectively and in good faith with the Union as the exclusive representative of all employees in the appropriate unit and, if an agreement is reached, reduce the terms to writing and to sign a collective-bargaining agreement. Having found that the Respondent refused to furnish the Union with relevant information, the Respondent will be ordered to furnish the requested information. Having found that the Respondent subcontracted bargaining unit work, the Respondent will be ordered to cease the practice and bargain collectively and in good faith with the Union about the issue. Because the record does not reveal which unit employees were adversely affected by this practice, a make-whole remedy is not indicated. Having found that the Respondent unilaterally paid reduced rates of pay to bargaining unit employees without bargaining with the Union, the Respondent will be ordered to restore the pay rates for its unit employees and to bargain collectively and in good faith about the issue and to make the employees whole in accordance with applicable precedents. And, having unlawfully discharged and refused to recall David Keith, the Respondent shall offer him reinstatement and make him whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

The Respondent will also be ordered to grant the Union access to its unit employees at Wehr's jobsites in accordance with past practice.

[Recommended Order omitted from publication.]